Neutral Citation Number: [2020] EWHC 1024 (Ch)

Case No: CH /2019/000296

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 29/04/2020

Before :

Mr Justice Miles

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Between :

1. THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF BRENT
2. SUSAN LYON — **Claimants/ Appellants**

- and -

MALVERN MEWS TENANTS ASSOCIATION LIMITED — **Defendant/ Respondent**

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Ms Sonia Rai (instructed by **Brent Council Legal Services**) for the **Claimant/Appellants**
Mr Alistair Cantor (instructed by **Cavendish Legal Group**) for the **Defendant/Respondent**

Hearing dates: 22 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 29 April 2020 at 10am

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Miles:

1. This is an appeal from an order of HHJ Parfitt, sitting in the Central London County Court, dated 4 September 2019. The Appellants were the Claimants in the court below and the Respondent was the Defendant. I will use those terms.

2. The proceedings concern a house at 59 Malvern Rd, Kilburn, London NW6 5PU ("the Property"). The First Claimant is the freehold owner of the Property and the Second Claimant is the tenant of a flat on the ground floor. The Property fronts onto Malvern Road, a public highway. Behind it is a walled garden which backs onto a private road called Malvern Mews ("the Mews road"). There is a gateway in the wall leading from the garden into the Mews road.

3. The Mews road is unregistered land. It has been maintained for many years by the Defendant, an incorporated residents' association, or a predecessor unincorporated residents' association. The members of the Defendant are residents of houses in the Mews. The Defendant claims to be the owner of the Mews road by adverse possession, but its title has not been established and ownership of the road is therefore uncertain. The identity of the owner of the road, if it is not the Defendant, is unknown.

4. The Second Claimant has been a tenant of the flat since April 2002. The judge found that she has used the gateway occasionally but infrequently since she became a tenant.

5. In May 2018 the Defendant caused the gateway to be bricked up so that the Second Claimant could no longer go through it into the Mews road. This was done without any notice to the First Claimant and only a few days' notice to the Second Claimant. The Claimants brought proceedings for damages and an injunction. The Defendant initially argued that the garden wall in which the gate was located was not the property of the First Claimant; the Defendant had indeed maintained or repaired the wall at its own expense for some years. After the service of expert evidence, and before trial, the Defendant abandoned that defence and accepted that the gateway should be reopened. It also offered to pay damages for trespass.

6. Before that, in their amended particulars of claim the Claimants had contended that one or both of them was entitled to an "easement of necessity or by prescription … to permit the First and/or Second Claimant access from the garden to Malvern Mews and beyond". Damages were claimed, among other things for interference with the Claimants' rights, which (on a natural reading of the pleading) included the alleged easement. The Defendant denied the easement and counterclaimed for a declaration that the Claimants had no easement over the Mews road.

7. There were open offers of settlement in the summer of 2019. These offers do not affect the legal rights of the parties but help to show the stance of the parties in the run up to the trial. The Claimants made an offer in a letter of 25 June 2019 in which they sought acknowledgement of an easement over the Mews road and undertakings not to obstruct their enjoyment of it with vehicles, plant pots, benches or other objects. The letter said that if the offer was not accepted the trial should be narrowed to the issues of costs, damages and easement as the Defendant had accepted that it had trespassed and that the wall belonged to the First Claimant.

8. The trial took place in September 2019. In opening the case, the Claimants' counsel explained, for the first time, that they were not going to base their claim for damages on interference with an easement; they restricted their claim to damages for trespass to their own land (the wall). The pleadings were not amended and the case that there was an easement was not abandoned or withdrawn. The Defendant continued to pursue the counterclaim and sought the negative declaration about the easement.

9. At the trial the judge accepted an undertaking by the Defendant to unbrick the gateway and awarded damages, including aggravated damages, of £1,900 to the Second Claimant. There was debate about whether a negative declaration should be granted. The judge decided to declare that the Claimants as owners of the freehold and leasehold interests in the Property had no right of way over the Mews. There is no appeal from the award of damages. The only appeal is by the Claimants against the decision of the judge to grant a negative declaration.

10. I approach this appeal with the following principles in mind. First, the decision to grant or withhold declaratory relief, including a negative declaration, is discretionary. An appellate court will only interfere with the exercise of a discretion when a judge has exceeded the generous ambit within which reasonable disagreement is possible: see, for instance, G v G [1985] 1 WLR 647 at 652.

11. Secondly, judges should be assumed to know their functions and the matters to be taken into account unless the contrary is proved; reasons for judgments are always capable of being better expressed; and an appellate court should resist substituting its own discretion for that of a trial judge through a narrow textual analysis enabling it to conclude that the judge has misdirected himself: Piglowka v Piglowski [1999] 1 WLR 1360 at 1372.

12. The third principle, stated in many cases, is that an appeal court will only allow a challenge to a trial judge's finding of fact where it is unsupported by evidence or where the decision is one which no reasonable judge could have reached.

13. Fourthly, the principles governing the exercise of the discretion to grant a declaration have been helpfully summarised, after a full review of the authorities, by Marcus Smith J in The Bank of New York Mellon v Essar Steel India Ltd [2018] EWHC 3177 (Ch) at [21] (given here without internal citation of authority):

> "The power to grant declaratory relief is discretionary. When considering the exercise of discretion, in broad terms, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the court should grant a declaration. More specifically:
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> (1) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

> (2) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
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> (3) The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the claimant is directly affected by the issue. In such cases, however, the court needs to proceed very cautiously when considering whether to make the declaration sought.
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> (4) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question", if all parties so wish, even on "private law" issues. This may be particularly so if the case is a test case or the case may affect a significant number of other cases, and it is in the public interest to decide the point in issue.
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> (5) The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial. […]
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> (6) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question, the court must consider the other options of resolving the issue."

14. Fifthly, where the declaration sought is negative, the court needs to consider the fairness of the process. Of particular concern is the case of a reluctant "defendant" who has not sought to assert a legal right or claim and yet is forced to establish its position in proceedings brought by another party. The Court of Appeal has explained that, provided appropriate caution is exercised and it is useful to do so, a court should not be reluctant to grant a negative declaration: see Messier-Dowty v Sabena [2001] WLR 2040 at paragraph [42]. The approach is pragmatic and the ultimate touchstone, provided the process is fair to both parties, is whether the negative declaration would be useful.

15. The judge in the present case took the principles from The Bank of New York Mellon case and considered the factors set out in paragraph 21 of it in turn. There was no criticism of him for doing so. He concluded, in summary, that there was a real dispute between the parties as to the existence of a right of way over the Mews road; that there was a prospect of the Claimants seeking to establish such a right of way in further proceedings; that on the evidence before the court there was no basis for asserting the existence of an easement; and that there would be utility to the parties and other court users in declaring what he considered to be the clear legal position on that evidence. He took into account the Claimants' submissions that they were not, at the trial, relying on the existence of an easement or themselves seeking a declaration, but decided overall that there were sufficient reasons to justify the grant of a declaration.

16. The Claimants have brought this appeal with the permission of Trower J granted on 5 February 2020. They say that the judge erred in several respects.

17. They say, first, that he erred in finding that there would be an issue estoppel. This ground concerns paragraphs 58 and 59 of the judgment, where the judge said he had considered merely dismissing the claim and leaving the parties to rely on an issue estoppel but had decided that he should go further and grant a declaration given the Claimants' statement that they may wish to raise the point in further proceedings. The Claimants say that the judge ought not to have concluded that there would be an issue estoppel, and his reasoning was flawed in this respect. I do not accept the submission. The judge was right to say that his judgment would give rise to an issue estoppel; the question he posed was whether it would help to go further and provide more clarity. By this stage the judge had already been through the various factors identified in The Bank of New York Mellon case and was considering whether something short of a declaration would suffice. I read him as concluding in paragraph 59 that a mere issue estoppel would not provide enough clarity as between the parties. His view was that the position should be spelt out for the benefit of the parties and that this would reduce the prospects of further disputes. I do not think that in doing so he acted outside the scope of his discretion.

18. I should also address a further point under this head. The Claimants say that the judge's order could be used to prevent them establishing a prescriptive right even if the Second Claimant continues to use the Mews road until 2022. I do not think that there is anything in this point; the declaration can only speak of the position at the time it was made and cannot prevent rights accruing through later events or acts of the parties. (I say nothing of course as to whether a prescriptive right would arise in that way or at that time.) I dismiss the first ground of appeal.

19. The second ground of appeal is that the judge took account of irrelevant considerations by treating the Claimants' attempt to reserve their right to bring further proceedings about an easement as a reason for granting a declaration. The Claimants submit that this is contrary to the principles set out in the authorities. I do not agree. The cases require that there be a real dispute between the parties and that the grant of a declaration would serve a useful purpose. The judge took the view that the Claimants' assertion that they could bring further proceedings showed a continuing dispute about the easement (indeed this was conceded at trial); and that there would be a benefit (achieving finality) from the grant of a declaration.

20. The third ground of appeal is that the judge erred by, in effect, throwing the burden of proof onto the Claimants, when they were not themselves seeking at trial to establish the existence of an easement. The Claimants also say that the judge did not undertake any analysis of the evidence and did not reach a reasoned finding of fact.

21. To assess this submission, I need to recap the procedural position. As already explained, the Claimants pleaded (among other things) that there was an easement (of necessity or by prescription) over the Mews Road. The Defendant denied this and counterclaimed for a declaration that the Claimants had no easement over the Mews road. The parties were therefore required to prepare for trial to address this issue, and to decide what inquiries to make and what evidence to call. I have also already mentioned the open offers between the parties in June 2019 in which the Claimants asked the Defendant to acknowledge the existence of an easement and to agree not to interfere with their enjoyment of it. That was how things stood as the parties went into the trial.

22. At the start of the trial the Claimants' position was that they did not need to establish an easement but wished to preserve their position to claim an easement in the future, possibly based on further evidence. The pleaded case that there was an easement was not formally abandoned. There was also the counterclaim which put the existence of the easement in issue. The Defendant maintained its case that there was no easement and sought findings and a declaration to that effect. The Claimants submitted both to the trial judge and this court that the assertion of an easement was not necessary for their case in trespass. That may be, but the pleaded case claimed damages on the basis of an interference with their legal proprietary rights which, on a reasonable view of the pleadings, included the alleged easement; and the counterclaim put things beyond doubt.

23. The Claimants say, as already noted, that the judge in effect reversed the burden of proof. I consider the allocation of the burden in cases such as this is more nuanced. As the Court of Appeal explained in Messier-Dowty the position of the parties is in some respects reversed and that is why the court must be careful to avoid injustice. The position appears to me to be as follows. Where a party claims a negative declaration as to the existence of a legal right, the overall burden of persuasion is and remains on that party; it is required to satisfy the court that the discretion to award a declaration should be exercised its way. But an evidential burden on specific issues within the dispute may well fall on the other party. Where one of the issues is whether a party has the benefit of a legal right adverse to the property of another, it may well be incumbent on that party to adduce at least some evidence of the existence of the right. In Poste Hotels v Cousins [2020] EWHC 582 (Ch), a decision given after the judgment in the present case, the defendant counterclaimed for a negative declaration that the Claimant did not enjoy certain parking rights over a third party's land by prescription. Morgan J at [93] rejected the argument that the defendant should bear the burden of proving the non-existence of the parking rights. I agree. A party asserting a legal right over the property of another (even if only by way of defence to a claim for a negative declaration) may reasonably be expected to provide some evidence for the existence of the right. Easements are rights adverse to an owner of a property and they do not arise without some good basis in fact; a party asserting such a right in proceedings (even if defensively) should in general be expected to call some evidence to sustain it. If it does not it risks the court deciding that the right does not exist. That is not to say that the overall burden of persuasion does not remain on the party claiming the negative declaration; it does.

24. These nuances concerning the burden in cases where a negative declaration is sought are a large part of the reason why a court must approach the grant of a negative declaration with appropriate caution and guard against the risk of unfairness to an unwilling "defendant", who may not itself wish the issue to be litigated at all. The potential procedural unfairness may indeed be a reason for denying a negative declaration.

25. At the trial in the present case the Defendant relied on some limited evidence to say that, as far as its officers were aware, the Claimants had no right of way over the Mews road. The Claimants (the party saying that the easement existed) chose to adduce no evidence to show its existence. The Second Claimant gave very brief evidence that she had used the Mews road, but her user did not extend to twenty years so her evidence could not establish a prescriptive right (even assuming the other

elements of the test for such a right were satisfied). There was no evidence of any earlier user. The claim to an easement of necessity was, as the judge held, hopeless as the occupiers of the Property could and did use the front door onto Malvern Road. It was not suggested to me that the judge was wrong about this. There was no evidence of any grant of an easement. There was no documentary evidence supporting any grant.

26. The Claimants indeed accepted at trial that, based on the evidence before him, the judge could properly reach the conclusion that there was no easement. Their argument was, rather, that he should refuse a declaration and should allow them to return to court later with different evidence to seek to establish their right. The judge was in my view entitled to decide the case based on the evidence before him and reach a finding of fact that there was no easement; he followed a conventional approach to his fact-finding exercise.

27. There was then the separate and distinct question whether it was appropriate to grant a declaration; but I do not consider that, in finding the facts about the existence of the easement as he did, the judge wrongly placed a burden on the Claimants. The transcript shows that he understood throughout that the overall burden of persuasion was on the Defendant, and nothing in his judgment suggests otherwise. I also reject the submission that the judge failed to make a proper finding about the existence of the claimed easement. It is plain from his treatment of the entire issue of the negative declaration that he found as a fact on the evidence before him that there was no easement. This ground of appeal is therefore rejected.

28. The fourth ground of appeal is that the judge erred in the overall exercise of his discretion. As already noted, the Claimants need to show that he exceeded the (generous) ambit of his power, not simply that he should have reached a different decision. The first argument under this head was again that he ought not to have been influenced by a concern about further proceedings, and that in doing so he exceeded his discretion. To a large extent this was a repeat of the first and second grounds of appeal, which I have addressed above. There are however some additional points under this broad head.

29. The Claimants submit, first, that the judge should not have entertained the application for a declaration in the absence of the unidentified freeholder of the Mews road. There are several points here. To begin, the position is not as stark as the Claimants suggested. The Defendant claims to be the owner of the Mews road by adverse possession. It has had sole responsibility for the maintenance of the road for years and there was no evidence of anyone else claiming ownership of the road. This is not therefore a case where a third party with no interest or concern in the land in question is officiously seeking a declaration about it: the Defendant has in practice been responsible for the use and maintenance of the land and has a legitimate interest in knowing what rights (if any) third parties such as the Claimants may have to use or pass over it. But, secondly, even if the true owner of the land is a third party, this would not bar the grant of a declaration; the touchstone is whether the order has utility. In the Poste Hotels case the parties were each seeking declarations about their respective rights of the other over a private road which they did not themselves own. Morgan J did not treat this as a bar to a declaration (albeit he refused a declaration in the exercise of his discretion on other grounds). Thirdly, the maxim that a court ought not, in general, to grant a declaration affecting the rights of third parties is designed to

protect such parties from *adverse* orders. There is nothing in the present declaration adverse to the interests of the putative third party owner of the land. Fourthly, it was always open to the Claimants themselves to make further inquiries about the putative owner of the freehold and to join it as a party if it chose. It did not do so. For these several reasons I reject this challenge.

30. The Claimants next submit that it was unfair to expect them to establish an easement. This submission echoes the concerns found in some of the authorities about reluctant "defendants". The ground has largely been covered under the third ground above. I do not accept that the judge erred in the exercise of his discretion in this regard. The Claimants had asserted the existence of an easement in their pleadings. They pursued that assertion until the start of the trial. They had sought an acknowledgement of the easement, and related protective assurances, in the open offer of June 2019. They cannot be regarded as reluctant "defendants", and I do not think that the judge acted unfairly or incautiously in deciding that it was appropriate to grant the declaration.

31. The Claimants also submit under this fourth, general, head that they had done nothing to interfere with the ability of the Defendant, or the residents of the Mews, to use or enjoy the Mews road and that the judge had gone wrong in granting a declaration at this stage. They also relied on the result of Poste House where Morgan J declined to grant a declaration on the basis that, on the facts of that case, it was premature, absent evidence of actual infringement of the claiming party's rights. It is not, however, a requirement for the grant of a declaration that there be actual or threatened interference with the rights of the claimant: see paragraph [99] of Poste House, citing the earlier decision of David Richards J in Pavledes v Hadjisavva [2013] 2 EGLR 123: the question for the court was rather whether a declaration would serve a useful purpose and whether there were special reasons for or against the grant of a declaration. The actual exercise by Morgan J of his discretion on the particular facts of Poste House cannot of course provide a blueprint for how the power is to be applied in other cases, including this one.

32. The judge in the present case concluded that a declaration would serve a useful present purpose. He was aware of the details and nature of the continuing dispute between the parties, including in the pleadings and the open offers of June 2019 in which the Claimants had sought assurances that the Defendant would not obstruct their alleged rights, including by placing plant pots or benches or by parking cars in the way. His conclusion was that a declaration would bring greater clarity to the rights of the parties *inter se* and this would assist to reduce the chances of further litigation arising. I consider that there was material on which he could reasonably reach these conclusions. I certainly do not think that he acted outside the ambit of his discretion in this regard.

33. More generally, as I have already explained, it is not my role on this appeal to decide whether I would have reached the same decision in the exercise of my discretion. My role is to decide whether the judge exceeded the generous bounds of his discretion, and for the reasons I have given I do not think that he did. I therefore dismiss the appeal. It is unnecessary to consider the respondent's notice by which the Defendant would have sought to uphold the order on different grounds.

34. I invite the parties to seek to agree an order, including as to costs. I will rule on any points of dispute.